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13 ELECTRONIC ARTS, INC. AND CHILLINGO LTD.

14 UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 MARC OPPERMAN, on Behalf of Himself
18 and All Others Similarly Situated,

19 Plaintiff,

20 v.

21 PATH INC., et al.,

22 Defendant.

Case No. 3:13-cv-00453-JST

**ELECTRONIC ARTS, INC. AND
CHILLINGO LTD.’S REPLY IN SUPPORT
OF THEIR MOTION TO SEVER
PURSUANT TO FED. R. CIV. PROC. 21**

Date: April 4, 2013

Time: 2:00 p.m.

Place: Courtroom: 9, 19th Floor

Hon. Jon S. Tigar

25 **I. INTRODUCTION**

26 In their improper response filed by counsel who is not admitted to practice in this Court,
27 Plaintiffs ignore overwhelming case law supporting severance and focus instead on irrelevant
28 procedural arguments. Setting aside the irrelevant, Plaintiffs’ argument boils down to a single

1 point: joinder is proper because each App Defendant allegedly distributed their app through the
 2 Apple Store. (Opposition to Motion to Sever (“Opp.”) at 8). If this weak link supports joinder,
 3 claims against any number of software developers with software developed for any common
 4 platform and sold by a single retailer could be joined because every platform sets guidelines for
 5 application developers and every retailer chooses products to sell.¹

6 The key “transaction or occurrence” in this case is not how the apps were distributed, but
 7 when and how Plaintiffs’ address book contacts were allegedly uploaded. The alleged uploading
 8 did not arise out of the same transaction or occurrence, but separately within each app, after each
 9 was sold, and under each app’s unique disclosures, terms and conditions. Each app also served a
 10 different function and employed different technology. Contrary to this Court’s prior decisions,
 11 Plaintiffs offer nothing more than a similar basic scenario for each app with similar legal theories
 12 to support joinder. *Bias v. Wells Fargo & Co.*, No. 12-CV-664 YGR, 2012 WL 2906664, at *2
 13 (N.D. Cal. July 13, 2012). EA and Chillingo should be severed.

14 II. ARGUMENT

15 A. PLAINTIFFS’ OPPOSITION SHOULD BE STRICKEN BECAUSE 16 COUNSEL IS NOT ADMITTED TO PRACTICE IN CALIFORNIA OR 17 THE NORTHERN DISTRICT

18 Only attorneys admitted to the bar of the Northern District of California may practice
 19 before this Court. N.D. Cal. Local Rule 11-1(a). Plaintiffs’ counsel, Jeff Edwards and Carl F.
 20 Schwenker, are not admitted, and no order allows them to appear *pro hac vice*. No member of the
 21 bar of this Court has appeared on Plaintiffs’ behalf.² In every pleading filed after transfer, counsel
 22 state they are “to be admitted *pro hac vice*,” but neither has filed an application under Local Rule
 23 11-3. This conduct is subject to discipline, including striking Plaintiffs’ improperly filed response.
 24 See Local Rule 11-8 (“A person who exercises, or pretends to be entitled to exercise, any of the
 25 privileges of membership in the bar of this Court, when that person is not entitled to exercise such

26 ¹ See, Android Developer Components, <http://developer.android.com/guide/components/index.html>;
 27 Windows Mobile Developer Center, <http://msdn.microsoft.com/en-us/windowsmobile/bb264318.aspx>;
 28 Windows Dev Center Windows Store Apps, <http://msdn.microsoft.com/library/windows/apps/>.

² California-barred counsel appeared in the Western District of Texas, but withdrew on August 23, 2012.
 See Dkt. 77 (Motion to Withdraw as Associate Counsel for Plaintiffs, August 10, 2012) and Dkt 99, Order,
 August 23, 2012 (granting motion to withdraw).

1 membership privileges, may be referred to the Standing Committee in addition to any action
2 authorized by applicable law.”). Plaintiffs’ response should be stricken.

3 **B. THE WESTERN DISTRICT OF TEXAS’S ORDER DOES NOT**
4 **PRECLUDE FILING A MOTION TO SEVER OR ANY OTHER MOTION**

5 **i. Law of the Case Does Not Apply**

6 Contrary to Plaintiffs’ argument, the “law of the case” doctrine does not bar Electronic
7 Arts, Inc. (“EA”) and Chillingo Ltd.’s (“Chillingo”) motion to sever. The “law of the case”
8 doctrine only prevents a court “from reconsidering an issue that *has already been decided* by the
9 same court, or a higher court in the identical case.” (See Opp. at 9, n.13 *citing United States v.*
10 *Alexander*, 106 F.3d 874, 876 (9th Cir. 1997)) (emphasis added). EA and Chillingo did not file a
11 motion to sever before Judge Sparks and his order did not, and could not, have decided whether
12 EA and Chillingo were properly joined. This motion thus does not “reopen issues decided in
13 earlier stages of the same litigation” and the law of the case doctrine does not apply. *Agostini v.*
14 *Felton*, 521 U.S. 203, 236 (1997).

15 Judge Sparks’s order expressly allows EA and Chillingo’s motion. Judge Sparks only
16 ruled on defendants’ motions to transfer and dismissed all others “without prejudice,” which
17 allows those motions to be filed again after transfer. (Dkt. 217 at 8); *Semtek Int’l Inc. v. Lockheed*
18 *Martin Corp.*, 531 U.S. 497, 505 (2001) (“The primary meaning of ‘dismissal without prejudice’ .
19 . . . is dismissal without barring the plaintiff from returning later, to the same court, with the same
20 underlying claim.”); *Ford v. Pliler*, 590 F.3d 782, 788 (9th Cir. 2009) (citing Black’s Law
21 Dictionary 502 (8th Ed. 2004) (defining “without prejudice” as “[a] dismissal that does not bar the
22 plaintiff from refileing the lawsuit within the applicable limitations period.”) The Ninth Circuit has
23 stated that dismissal without prejudice does not create “law of the case” and does not have
24 preclusive effect. *Los Angeles Trust Deed & Mortg. Exch. v. SEC*, 285 F.2d 162, 165 (9th Cir.
25 1960) (court’s prior dismissal “without prejudice” was intended to avoid establishing “law of the
26 case”); *Weinberg v. Whatcom County*, 241 F.3d 746, 750 (9th Cir. 2001) (“a dismissal without
27 prejudice is not a decision on the merits and thus lacks preclusive effect.”)

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1 Further, at the time Judge Sparks decided the motion to transfer, the case included two
 2 defendants, Path and Apple, who were also defendants in similar class actions pending against
 3 them in this Court. Rather than ruling that joinder of all defendants was proper, the court ruled
 4 transfer was proper, in part, because the risk of inconsistent rulings by two different tribunals in
 5 two different jurisdictions would waste resources and risk inconsistent rulings. The court's ruling
 6 is understandable because cases already pending in this Court concerned the same transactions and
 7 occurrences as to Path, and overlapping transactions and occurrences as to Apple.

8 **ii. Defendants' Time to Respond Has Not Elapsed**

9 Plaintiffs' argument that defendants have not filed a timely answer is misleading and
 10 unfounded. First, Fed. R. Civ. P. 21 allows this Court "[o]n motion or on its own ... at any time,
 11 on just terms, add or drop a party. The court may also sever any claim against a party." Severance
 12 is thus proper anytime, even without a motion to sever. Second, Defendants did not act as though
 13 they had unlimited time to respond to the Second Amended Complaint ("the Complaint" or
 14 "SAC"). Defendants actively engaged Plaintiffs on scheduling issues almost immediately after the
 15 motions to transfer were granted and Plaintiffs' statements to the contrary are demonstrably false.³
 16 Defendants' counsel have repeatedly tried to reach an agreement with Plaintiffs' counsel through
 17 multiple avenues. Plaintiffs' counsel suggested that they would agree to a scheduling stipulation,
 18 only to argue now that Defendants response to the SAC was due on January 29, 2013, which is
 19 before the case was even docketed in this district. (Dkt. 219).

20 **C. PLAINTIFFS' ARGUMENTS AGAINST SEVERANCE FAIL**

21 **i. Plaintiffs' Argument that Discovery is Necessary Fails**

22 Plaintiffs argue that EA and Chillingo's motion is premature because discovery is
 23 necessary to determine whether severance is proper. This argument is based on Plaintiffs'
 24 assertion that there is an issue of fact regarding consumer consent that warrants discovery. Opp. at
 25

26 ³ See Declarations of Timothy L. Alger (Dkt. 269-1) and Marc J. Zwillinger (Dkt 269-2)
 27 in Support of Defendants' Administrative Motion to Set Time for Response to Second Amended
 28 Complaint or, Alternatively, to Schedule a Case Management Conference, Pursuant to Local Rule
 7-11, filed on March 6, 2013, and Declaration of S. Ashlie Beringer in Support of Defendants'
 Administrative Motion to Set Time for Response to Second Amended Complaint or, Alternatively, to
 Schedule a Case Management Conference, Pursuant to Local Rule 7-11(Dkt. 275).

1 9-10 (citing SAC ¶¶250-54, 262-65.) The problem with this argument is apparent on the face of
2 the SAC: the general and conclusory paragraphs stating that the apps’ uploading of address book
3 information was “non-consensual” are inconsistent with the SAC’s specific factual allegations
4 explaining that the apps incorporating the Crystal social network (“Crystal”) obtained consent.
5 More specifically, the SAC alleges Crystal did *not* act surreptitiously. Address book information
6 was uploaded to Crystal only *after* each Plaintiff voluntarily took action to find contacts also using
7 Crystal. (SAC ¶¶ 247, 261). The SAC further alleges that Plaintiffs who downloaded Angry Birds
8 Classic or Cut the Rope had a choice to connect their contacts to Crystal to play games. *Id.* The
9 SAC clearly alleges that after signing up with Crystal, Plaintiffs had to “press a button bar” to
10 invite or find friends. *See id.* Plaintiffs’ only claim is that despite being told that pushing the
11 button would result in finding friends also using Crystal from their contacts, they did not know
12 how it would work.⁴ But Plaintiffs do not explain in their Opposition why this disclosure was
13 inadequate other than it lacked the magic word “upload.” Indeed, the SAC alleges that Plaintiffs
14 were satisfied when a few more words were added, including “upload,” to the existing disclosure
15 language. (SAC ¶¶ 255, 270).

16 Plaintiffs also fail to explain what discovery will disclose that is relevant to the severance
17 issue. Discovery will produce information about eleven different applications, allegedly made by
18 fifteen different defendants and sold to thousands of different users and will not change the fact
19 that each defendant is unique. Rather than resolve the severance issue, discovery will only
20 prejudice EA and Chillingo.

21 **ii. Common Distribution Does Not Constitute “the Same Transaction or
22 Occurrence”**

23 Plaintiffs’ primary argument in opposition is that common distribution through Apple
24 constitutes “the same transaction or occurrence.” Plaintiffs overlook, however, the simple fact that
25 their claims against EA and Chillingo are based on use, not distribution. Instead, Plaintiffs
26 challenge the collection of address book information, alleging that defendants accessed and used
27 Plaintiffs’ mobile address books without consent. (SAC ¶¶ 5, 7, 79.)

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⁴ The complaint does not allege what Plaintiffs thought “find my friends via contacts” meant.

1 Plaintiffs' argument that using the same distributor creates a "factual commonality" that
2 justifies joinder collapses the "same transaction or occurrence" and "factual commonality" tests
3 into one. Rule 20(b), however, allows joinder only when *both* the "same transaction" test is met
4 *and* the common question of law or fact tests are met. *See S. F. Tech., Inc. v. Adobe Sys. Inc.*, Nos.
5 CV 10-01652 RS, C 09-6083 RS, 2010 WL 1640397, at *1 (N.D. Cal. Apr. 19, 2010) (both Rule
6 20(b)(2)(A) and (B) "must be satisfied"). Plaintiffs cannot satisfy that test here and make no
7 argument in their Opposition to the contrary. As noted in the opening brief, the SAC makes
8 claims against 11 separate and distinct mobile apps, all of which utilized different disclosures and
9 different terms of use. Any alleged uploading occurred pursuant to each app's own process and
10 pursuant to each app's unique disclosures, terms and conditions.

11 Plaintiffs do not distinguish any of the cases EA and Chillingo cited, all of which
12 conclude that a connection as weak as a common distribution outlet cannot support joinder.
13 Instead, they avoid the issue, including case law from this district, because the case law makes
14 clear that joinder based on such a weak connection is improper. *See, e.g., EIT Holdings LLC v.*
15 *Yelp!, Inc.*, No. C 10-05623 WHA, 2011 WL 2192820, at *1-2 (N.D. Cal. May 12, 2011); *S.F.*
16 *Tech., Inc.*, 2010 WL 1640397, at *1-2; *Bias*, 2012 WL 2906664, at *2 (severing defendants even
17 when claims against them were "based upon the same basic scenario and same legal theories....")
18 This Court should not depart from its prior decisions, and EA and Chillingo should be severed.

19 **iii. Joinder Would Prejudice EA and Chillingo and Burden Judicial**
20 **Resources**

21 By naming so many unrelated defendants, Plaintiffs' counsel is trying to reduce their
22 burden in pursuing multiple actions for multiple Plaintiffs. Plaintiffs argue "severance would
23 complicate matters and prejudice numerous parties" (Opp. at 7 n. 10), but only Plaintiffs' counsel
24 would be burdened by bringing separate lawsuits against separate defendants. Severing EA and
25 Chillingo would not prejudice any of the Plaintiffs in pursuing any valid claims they think they
26 might have. Instead, if the Court does not sever EA and Chillingo, participation in an excessively
27 complex litigation with defendants who had different processes and disclosures could result in
28 their disclosures and consent processes being overlooked. *See Bias*, 2012 WL 2906664, at *1

1 (citing *On The Cheap, LLC v. Does 1–5011*, 280 F.R.D. 500, 502 (N.D. Cal. 2011)) (“Even if the[]
2 conditions [for joinder] are met, joinder is not mandatory and the Court may order separate trials
3 to protect any party against embarrassment, delay, expense, or other prejudice.”).

4 Trying this case with fifteen defendants and eleven different applications at issue would
5 waste judicial resources and create inefficiencies. The SAC alleges an expansive, nationwide class
6 of all Apple Device owners who downloaded apps from the Apple App Store that “initiated an
7 unauthorized [Apple Device] call,” followed by a series of possible acts asserted in the
8 alternative—that address books were “copied” *or* “uploaded” *or* “transmitted,” *or* “disclosed to
9 others” *or* “remotely stored,” *or* “otherwise remotely used by others.” (SAC ¶ 46.) It is hard to
10 imagine how the parties, Court, and jury could manage such allegations, involving various
11 technologies, during discovery, dispositive motions, or class certification, much less trial. *See*,
12 *e.g.*, *Norwood v. Raytheon Co.*, 237 F.R.D. 581, 589-605 (W.D. Tex. 2006) and *Norwood v.*
13 *Raytheon Co.*, No. EP-04-CA-127-PRM, 2007 WL 2408480, at *3 (W.D. Tex. May 1, 2007)
14 (denying class certification and later severing claims because of factual differences among
15 defendants and their products, variations in warnings Plaintiffs received and their injuries, and
16 choice-of-law issues); *Advantel, LLC v. AT&T Corp.*, 105 F. Supp. 2d 507, 515 (E.D. Va. 2000)
17 (holding joinder of defendants inappropriate because of differences in dealings with each would
18 not “streamline the resolution of the case” and “indeed may lead to confusion at trial”).

19 **D. EA AND CHILLINGO ARE NOT ESTOPPED FROM MOVING TO SEVER**

20 Plaintiffs’ opposition avoids mentioning the standard for judicial estoppel in the Ninth
21 Circuit, because EA and Chillingo’s positions do not even approach that high standard. “[J]udicial
22 estoppel generally prevents a party from prevailing in one phase of a case on an argument and then
23 relying on a contradictory argument to prevail in another phase.” *Zedner v. United States*, 547 U.S.
24 489, 504 (2006) (internal citations and quotations omitted). Before applying judicial estoppel,
25 however, courts in the Ninth Circuit must determine: (1) whether a party’s positions are “clearly
26 inconsistent,” (2) whether a party “has succeeded persuading a court to accept that party’s earlier
27 position, so that judicial acceptance of an inconsistent position in a later proceeding would create
28 the perception that either the first or the second court was misled,” (3) whether the party would

1 gain an unfair advantage by advancing inconsistent positions, and (4) whether the party's position
2 is "tantamount to a knowing misrepresentation or even fraud on the court." *Milton H. Greene*
3 *Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 994 (9th Cir. 2012) (internal citations and
4 quotations omitted).

5 EA and Chillingo's positions do not even satisfy the first factor, because they are
6 consistent. Plaintiffs' argue that EA and Chillingo are judicially estopped from bringing this
7 motion because in moving to transfer, they "incorporated by reference" Apple's previous
8 argument that these cases were "substantially similar." This characterization of the previous
9 motion is wrong. EA and Chillingo joined Apple's motion to transfer based on an enforceable and
10 applicable venue selection clause: "downloads" of their apps "were all subject to Apple's terms
11 and conditions," which provided for venue in this Court. Defs.' Mot. to Dismiss, or in the
12 Alternative Transfer, Oct. 12, 2012, Dkt. 124 at 1. EA and Chillingo did not incorporate by
13 reference Apple's argument that two similar cases were already pending in this district. Opp. at 9.
14 Instead, they simply referred the Court to a section of Apple's brief that provided details about
15 those two cases. Dkt. 124 at 17. Further, even if EA and Chillingo had incorporated Apple's
16 argument in their motion to dismiss or transfer, EA and Chillingo moved to transfer, not to
17 consolidate the present case with the case against Apple already pending in this district. EA and
18 Chillingo made it clear to Judge Sparks in their previously filed motion to dismiss the case against
19 them was distinct from the case against other app defendants. Indeed, EA and Chillingo drew
20 precisely the same distinctions in their motion to dismiss as they draw here. Defs.' Chillingo and
21 Electronic Arts' Reply In Supp. of Mot. to Dismiss Pursuant to Fed. R. Civ. P. 12(B)(6), Dkt. 213.
22 EA and Chillingo have advanced consistent positions throughout this litigation and are not
23 estopped from seeking severance.

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1 **III. CONCLUSION**

2 For the reasons set forth above and in their motion, EA and Chillingo respectfully request
3 the Court sever claims against them from this matter under Rule 21.

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11 DATED: March 18, 2013

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